

Claimant contends his treatment by Dr. Douglas Burton has not improved, cured or relieved his symptoms, and he requests Dr. Ali Manguoglu be authorized as his treating physician. Claimant argues that Dr. Manguoglu has opined that he is in need of medical treatment including physical therapy, a series of lumbar epidural steroid injections, and a TENS unit. In addition, Dr. Manguoglu has indicated he would refer claimant to Dr. Gary Harbin for treatment of claimant's pelvic fractures.

Respondent argues that it has provided claimant with reasonable medical treatment and claimant remains authorized to obtain necessary treatment through Dr. Douglas Burton, including physical therapy. Respondent further argues that claimant has failed to demonstrate that the treatment provided by Dr. Burton is unsatisfactory and, therefore, the ALJ's order should be affirmed. In the alternative, should the Board determine that Dr. Burton's care is unsatisfactory, then respondent should be allowed to submit a list of three physicians to claimant.

The issues for the Board's review are: Is claimant entitled to a change of physician? If so, is claimant entitled to have Dr. Ali Manguoglu authorized to be his treating physician for medical treatment and referrals?

#### **FINDINGS OF FACT**

On January 24, 2004, claimant was struck by a forklift at work and pinned against a beam. He suffered crush injuries to his pelvis and abdomen. His pelvis fracture was treated conservatively, but the injuries to his abdomen required at least four surgeries. He was off work approximately 7 1/2 months and returned to an accommodated position. He settled his workers compensation claim on February 8, 2006, in a running award that represented a 23.3 percent permanent partial disability.

Claimant continues to work at respondent in the accommodated position, and he also works as a cattle counter for Farmers and Ranchers Livestock Commission Company one day a week. In that position, he is on his feet for up to five or six hours. He occasionally walks around in the cattle pens and opens and closes gates. Claimant currently complains of stabbing pains in his hip joints on both sides that shoot down his legs. He says that intermittently his feet will go numb.

Since February 9, 2007, claimant's authorized treating physician has been Dr. Douglas Burton, a board certified orthopedic surgeon. Claimant testified that he is dissatisfied with Dr. Burton's treatment because his only recommendation has been that he participate in water therapy and further because he had only been seen by Dr. Burton three or four times over a two-year period. At the request of his attorney, claimant was seen by Dr. Ali Manguoglu, a board certified neurosurgeon, on October 1, 2008, for a second opinion and now requests that Dr. Manguoglu be authorized as his treating physician.

Dr. Manguoglu first saw claimant on October 9, 2006. He reviewed an MRI that he found was compatible with a disc herniation at L5-S1. He diagnosed claimant with low back and left sided sciatica with the possibility of a disc herniation at L5-S1 and recommended claimant have a lumbar myelogram, post myelogram CT scan, and EMGs and nerve conduction studies.

In October 2008, claimant complained to Dr. Manguoglu that he had back pain that radiated into both buttocks and down his left leg, as well as pain in his pelvis. Dr. Manguoglu examined claimant and again reviewed the 2006 MRI. He diagnosed claimant with low back injury with intermittent left sided leg pain with disc protrusion or herniation at L5-S1 and post traumatic pelvic fractures. His recommendations for further treatment included formal physical therapy concentrating on his back and left sided sciatica, a series of lumbar epidural steroid injections, and a TENS unit for chronic pain. He said that normally if a patient goes through all that and is still having significant back and leg pain, he would order new testing and possibly consider surgery. However, his report of October 1, 2008, indicates that he did not see anything surgical from claimant's studies. Claimant also asked Dr. Manguoglu about treatment for his pelvic condition. Dr. Manguoglu said that was not in his field but that, if authorized, he would refer claimant to Dr. Gary Harbin for an opinion concerning his pelvis.

Dr. Douglas Burton testified that he first saw claimant on February 9, 2007, to evaluate his low back and leg symptoms. Claimant's pelvis fracture had healed without surgery. Claimant's chief complaint was back pain and bilateral posterior thigh pain. He reviewed claimant's medical records and performed a physical examination. He diagnosed claimant with low back pain with degenerative disc disease. After Dr. Burton's initial examination, he recommended that claimant begin a water walking program. Dr. Burton said that walking in water is a gentle way to exercise but it causes the whole body to work, particularly the core (abdominal) muscles. He believed that a lot of claimant's problem was muscle imbalance because his core muscles were weak after the injury and surgeries. He believed that if claimant could build up his core muscles, he could improve his symptoms.

Dr. Burton next saw claimant on June 1, 2007. Claimant told Dr. Burton he felt like the water therapy helped and that his muscle spasms had improved. He still had back pain, but it was better. Dr. Burton did not recommend any further treatment, other than recommend he continue the water therapy.

Dr. Burton next saw claimant on August 24, 2007. Claimant reported that his symptoms were worse. Dr. Burton did not document that he examined claimant. He testified, however, that claimant had no neurological changes, as he did not describe loss of ability to move a leg, a foot drop, or changes in bowel or bladder function. He encouraged claimant to continue what he had been doing and told him he would see him on an as-needed basis.

Claimant returned to see Dr. Burton in August 2008. He complained that his pain was worse. Claimant said he had stopped water walking, and Dr. Burton urged him to begin again. He and claimant spoke about claimant's work and restrictions and, in the end, determined that Dr. Burton would not change his restrictions.

Dr. Burton saw claimant again on November 7, 2008. Dr. Burton's assessment was that claimant was managing his symptoms fairly well. He was not missing work and was

not taking a lot of pain medication. Again, they determined that claimant's restrictions would not be changed.

Dr. Burton reviewed the medical report of Dr. Ali Manguoglu. Dr. Burton said that if claimant wanted to pursue formal physical therapy, it would not be unreasonable. He would leave up to the therapist whether a TENS unit would benefit claimant. He would not, however, recommend epidural steroid injections because claimant's symptoms are muscle spasm-type symptoms and injections are more effective with patients who have a more radicular component to their symptoms. He said that based on the MRI done in 2006, claimant did not have any nerve compression symptoms. Instead, his symptoms are more in the back.

Because claimant's symptoms are low back pain and at the minimum three levels of degenerative disc disease, Dr. Burton believed that he would be a poor surgical candidate, and further he did not think the outcome of surgery would be very good. He said the 2006 MRI did not show a surgical lesion existed at that time. He said it was possible a lesion could have developed since, but then he would not tie that back to claimant's work injury.

Dr. Burton did not believe more diagnostic testing for claimant's pelvis or low back was warranted because he had a high level of testing for his low back up to two years after his injury and the results were "under-whelming" in terms of finding something treatable with intervention.<sup>1</sup> Dr. Burton said he would order an MRI if he felt that claimant had developed some new type of symptom, such as nerve compression symptoms, herniated disc symptoms, or spinal stenosis symptoms. But although claimant's symptoms have exacerbated, they are consistent with back pain and back spasm. He did not think a new MRI would show anything different than the one done previously. Dr. Burton said that he believes that claimant's symptoms would wax and wane with his activity, as he ages, and with his overall level of conditioning.

Dr. Burton recommended that claimant continue his water therapy. He did not believe that claimant's symptoms were coming from his hip joints but, instead, thinks they are coming from his low back. He admitted he has not evaluated claimant for his pelvic fractures, but his understanding of claimant's medical records is that claimant's pelvic fracture had healed with no surgery.

#### **PRINCIPLES OF LAW**

In claimant's request for post-award medical treatment, he has the burden to prove his right to an award of compensation and prove the various conditions on which his right

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<sup>1</sup> Burton Depo. at 21.

depends.<sup>2</sup> In a post-award medical proceeding, an award for additional medical treatment can be made if the trier of fact finds that the need for medical care is necessary to relieve and cure the natural and probable consequences of the original accidental injury which was the subject of the underlying award.<sup>3</sup>

K.S.A. 2008 Supp. 44-510h states in part:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders, including transportation expenses computed in accordance with subsection (a) of K.S.A. 44-515 and amendments thereto, as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b) (1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.

#### **ANALYSIS**

Respondent offered to furnish claimant with the names of three physicians from which claimant may choose one to be his authorized treating physician. However, claimant apparently refused this offer, demanding instead that Dr. Manguoglu be his authorized physician. K.S.A. 2008 Supp. 44-510h(b)(2) provides that upon a finding that the services of the authorized physician are not satisfactory, the respondent shall submit the names of three health care providers from which the claimant may select one to be the new authorized physician. Respondent offered to voluntarily do what the statute provides as a remedy if claimant were successful in proving the services of Dr. Burton are unsatisfactory. Were that offer still open, then the issue before the Board would be moot. But in its submission letter/brief to the ALJ, respondent does not indicate the offer is open.

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<sup>2</sup> K.S.A. 2008 Supp. 44-501(a).

<sup>3</sup> K.S.A. 2008 Supp. 44-510k(a).

Rather, respondent argues that remedy is only available “if this Court finds Dr. Burton’s treatment unsatisfactory.”<sup>4</sup> Likewise, in its letter brief to the Board, respondent argues that the ALJ’s Award should be affirmed and that the remedy of providing a list of three names should be ordered only if Dr. Burton’s treatment is determined to be unsatisfactory.<sup>5</sup> Accordingly, the issue of whether Dr. Burton’s treatment is unsatisfactory is not moot.

Claimant suffered crush injuries to his pelvis and abdomen. The fractured pelvis healed without surgery. His internal injuries required multiple surgeries, including the correction of recurrent hernias. He has chronic low back pain with pain radiating to the buttocks. This back condition has been diagnosed as degenerative disc disease by Dr. Burton, but the back has been treated as part of the work-related injuries.

Claimant has been treated by several physicians. Since February 2007, his authorized treating physician has been Dr. Burton, who is a board certified orthopedic surgeon. Although Dr. Burton agrees with Dr. Manguoglu that claimant has a disc protrusion or herniation at L5-S1, Dr. Burton does not believe that claimant is in need of additional diagnostic testing, nor does he consider claimant to be a candidate for either epidural injections or surgery. Instead, Dr. Burton recommends claimant continue with physical conditioning using water therapy. In addition, should claimant desire formal physical therapy, he would prescribe that treatment for him. It does not appear that claimant is continuing with his water therapy, nor does the record show that claimant has requested physical therapy from Dr. Burton. As Dr. Burton wanted a physical therapist to evaluate whether claimant would benefit from a TENS unit and claimant has not been to a physical therapist, that treatment option remains unexplored.

The ALJ determined that claimant has failed to prove the treatment being provided by Dr. Burton is objectively unsatisfactory or that there is something Dr. Burton is failing to do. Dr. Burton is willing to pursue some but not all of the treatment options suggested by Dr. Manguoglu. He says epidural steroid injections would not benefit claimant because claimant’s symptoms are mechanical back pain, not true radiculopathy. Similarly, Dr. Burton does not believe claimant would receive relief of his symptoms from surgery. Dr. Burton’s opinions are well founded in fact. He is fully informed of claimant’s prior history and medical treatment. He has offered claimant treatment options that claimant has not fully followed. Despite the success of the earlier water therapy in reducing claimant’s symptoms, he has chosen not to continue with that recommendation, nor has he pursued Dr. Burton’s offer to prescribe physical therapy. Claimant should follow up with this treatment option and possible TENS unit through Dr. Burton before a change of physician can be said to be warranted.

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<sup>4</sup> Resp. Post-Award Brief at 5, (filed Mar. 4, 2009).

<sup>5</sup> Resp. brief to Board dated June 18, 2009 (filed June 25, 2009) at 2.

Based on this record, the Board is unable to conclude that Dr. Burton's treatment is unsatisfactory.

**CONCLUSION**

Claimant is not entitled to a change of physician.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that the Post-Award Medical Award of Administrative Law Judge Bruce E. Moore dated April 22, 2009, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of July, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge